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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Interconnection and Resale)

Obligations Pertaining to)

Commercial Mobile Radio Services)

CC Docket No. 94-54

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COMMENTS OF PAGING NETWORK, INC.

PAGING NETWORK, INC.

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Summary

Paging Network, Inc. ("PageNet") strongly advocates that the Commission not impose any resale obligations on paging carriers. The record simply does not justify a policy whose objectives have been achieved by virtue of the paging market's competitive forces and the Commission's policies of open entry and spectrum allocation. The paging market's characteristics are markedly different from the private line, MTS/WATS and cellular markets where resale obligations have been imposed in the past.

The Commission raised questions as to whether mandatory resale would be appropriate or lawful for paging and other wireless services in the Second Notice of Proposed Rulemaking. As demonstrated herein, the highly competitive characteristics of the paging market remove any basis for imposing resale requirements on paging. Other factors, such as the abuse of price discrimination, lack of head start problems, and presence of technical innovation and new services introduced in the marketplace, all obviate any need or basis for imposing resale restrictions on paging. Conversely, the public and paging carriers risk substantial harm if a resale requirement is imposed by Commission order.

Sections 201(b) and 202(a) of the Communications Act do not require resale for paging. In fact, imposition of such a policy would be unjust and unreasonable and unjustly and unreasonably discriminatory, in violation of those provisions.

Resale obligations should not be implemented for paging carriers.

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COMMENTS OF PAGING NETWORK, INC.

Paging Network, Inc. ("PageNet"), by its attorneys, hereby submits its comments on resale issues raised in the Second Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 95-149, released April 19, 1995 ("Second Notice").

In posing its questions for comment on the resale issue in the Second Notice, the Federal Communications Commission ("FCC" or "Commission") clearly recognized that differences in paging and other services could result in different resale policies. Specifically, the Commission raised the issues of technical feasibility, reasonableness and necessity of imposing resale restrictions on specific classes of services, including paging, and tentatively concluded that such differences could support limiting resale obligations. ^{1/} In fact, the Commission asked whether resale obligations are unnecessary for paging operators. ^{2/}

^{1/} Second Notice, ¶ 87.

^{2/} Id.

PageNet strongly advocates that the Commission not impose any resale obligations on paging. As more fully explained below, the ostensible reasons for requiring resale in other services simply do not exist in the paging market today. In fact, the objectives that the Commission seeks to achieve in commercial mobile radio service ("CMRS") markets have been met in the paging market without governmental intervention imposing mandatory resale.

The Commission's goals have been achieved by virtue of the paging market competitive forces and the Commission's policies of open entry and spectrum allocation. Mandatory resale would not result in any benefit either to the paging customer or the paging carrier. In fact, such a policy would operate to the detriment of both the paging customer and carrier. Also, not imposing resale requirements on paging services would be consistent with Sections 201(b) and 202(a) of the Communications Act and would not be a denial of capacity to non-facilities based paging carriers in the context of Sections 201(b) and 202(a). Therefore, resale obligations should not be implemented for paging carriers.

**I. THE COMMISSION DOES NOT NEED TO JUMP-START COMPETITION
IN PAGING IN ORDER TO ENHANCE CONSUMER BENEFITS**

**A. Private Line, MTS/WATS and Cellular Services
Requirements are not Applicable to Paging Services**

In the Second Notice, the Commission tentatively concluded that imposing mandatory resale requirements on CMRS licensees would: Promote competition; provide a means of policing price

discrimination; mitigate head start advantages among licensees; provide some degree of secondary market competition in the area of retail price discrimination; provide a source of marketplace innovation; and possibly increase overall demand for CMRS services and increase overall traffic. ^{3/} Its tentative conclusion that these benefits would result from the imposition of a resale requirement likely flow from its perceptions that resale obligations were of substantial value in creating a competitive long distance marketplace and at least of some value in keeping cellular carriers from charging duopoly prices. However, the Commission's experience with these markets is inapposite to the paging/messaging industry as it exists today, and as it is highly likely will exist for the foreseeable future. The long distance industry was dominated by a single carrier, and the cellular industry, by virtue of the limited spectrum available, was a duopoly. Conversely, as set forth below, the paging industry and the public it serves already experience the benefits that resale obligations are ostensibly offered to provide.

B. The Paging Market is Already "Highly Competitive"

In every instance where the Commission has initially imposed mandatory resale requirements, e.g., private line, ^{4/}

^{3/} Second Notice at ¶ 84.

^{4/} Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, 60 FCC 2d 261, (1976) (Resale of Private Line Services), recon., 62 FCC 2d 588 (1977), aff'd sub nom. A.T.& T. v. F.C.C., 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1987).

MTS/WATS, ^{5/} and cellular ^{6/} services, the Commission's decision was based on the existence of monopoly or duopoly service providers. In each instance, there was the ability, or perceived ability, to charge supracompetitive rates and to cross subsidize competitive services with revenues from non-competitive services. Resale was a tool in those instances to attempt to allow resellers to take advantage of arbitrage opportunities, and ultimately to drive prices to costs.

Conversely, the Commission has never imposed resale requirements on competitive markets. Active and vigorous competition in a market eliminates the necessity for requiring resale because those deficiencies in the markets which the Commission might seek to correct do not generally exist.

The paging market is markedly distinguishable from those where the Commission has imposed resale, primarily because, as the Commission has already found, the paging market is "highly

5/ Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, CC Docket No. 80-54, 83 FCC 2d 167 (1980) (Resale of Switched Services), recon. denied, 86 FCC 2d 820 (1981).

6/ Cellular Communications Systems, CC Docket No. 79-318, 86 FCC 2d 469, 511, 642 (1981) (Cellular Order), modified, 89 FCC 2d 58 (1982), further modified, 90 FCC 2d 571 (1982), appeal dismissed sub nom. United States v. F.C.C., No. 82-1526 (D.C. Cir. 1983); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, Notice of Proposed Rulemaking and Order, CC Docket No. 91-33, 6 FCC Rcd 1719, 1724 (1991) (Cellular Resale NPRM and Order); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, Report and Order, CC Docket No. 91-33, 7 FCC Rcd 4006, 4008 (1992) (Cellular Resale Order), aff'd sub nom. Cellnet Communications v. F.C.C., 965 F.2d 1106 (D.C. Cir. 1992).

competitive," and the public has long benefitted from the service and price competition which characterize competitive markets. 7/ The Commission has already found that, "on average, a paging carrier faces five other paging carriers competing with it in a given market, and some face as many as nineteen." 8/ Since that finding, narrowband PCS service has been initiated, which potentially increases substantially the number of facilities based paging competitors. Of course, not only is there competition directly among common carrier and private carrier paging facilities, but also from carriers offering paging services over cellular, SMRS and FM subcarrier facilities. 9/

The Commission has also determined that ample spectrum has been available for paging services and for allowing new entrants into the market. The Commission noted:

In the 900 MHz band alone, there are forty private paging channels, of which roughly two-thirds are licensed to private carriers, and forty common carrier channels. Additionally, there are over thirty common and private carrier paging channels in the 150 MHz and 450 MHz bands. There are three nationwide common carrier paging channels. [Footnotes omitted.] 10/

7/ In the Matter of Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1468 (1994). (Second CMRS Report and Order).

8/ Id.

9/ See Section 73.295 of the Commission's rules. The Commission specifically recognized the existence of this use for paging services. Id.

10/ Id.

This amount of channel capacity means that the number of pagers per market is substantial. The Commission recognized that "literally tens of thousands of pagers" ^{11/} exist and the channel capacity is "increasing . . . dramatically." ^{12/}

The Commission has specifically acknowledged ease of entry in the paging market. ^{13/} PageNet is an example of a new company that entered the paging market and one that continues to enter new geographic and service markets. No barriers to entry exist in paging. Contributing to the ease of entry is the fact that "paging systems are relatively inexpensive to build." ^{14/}

By stark contrast, the characteristics of the MTS/WATS, private line and cellular markets at the time resale restrictions were imposed show that those markets were not competitive, capacity was not infinite or readily available to competitive providers, and entry into those markets was either impossible by virtue of state or federal regulation or extremely difficult because of economic restraints. Simply put, the Commission cannot justify the imposition of a resale requirement on paging carriers on the grounds that it will promote competition as it could in the private line, MTS/WATS, and cellular contexts. Vigorous competition already exists.

^{11/} Id.

^{12/} Id.

^{13/} Id.

^{14/} Id.

C. **Price Discrimination Does Not Exist Due to the Competitive Nature of the Paging Market**

The Commission has closely tied its findings of the existence of monopoly service providers to one of actual or potential price discrimination by the monopoly provider. Resale was thought to assist in the elimination of price discrimination among services, e.g., MTS and WATS. However, in a truly competitive market, price discrimination does not exist. Prices are driven to costs. As the Commission has found, "it is difficult to sustain price discrimination in a competitive environment where customers are free to choose among many alternative suppliers." ^{15/} If a carrier attempts to charge discriminatory rates, that carrier will be either forced to bring its rates in relation to cost or forced out of business entirely.

The ability to discriminate stems from market power, of which paging carriers have none in the vigorously competitive market in which they participate. ^{16/} Consistent with vigorously competitive markets, the paging market has no history of price discrimination at either the retail or wholesale level, nor the potential to engage in such price discrimination for the foreseeable future. In fact, prices for paging services to all

^{15/} Resale of Switched Services, 83 FCC 2d at 175.

^{16/} In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report & Order, 85 FCC 2d 1, 6, 20 (1980).

segments of the public have been falling rapidly over the last ten or so years. ^{17/} The Commission, therefore, cannot justify the imposition of a resale requirement based on the need to eliminate price discrimination.

**D. Head Start Issues Have No Relevance
to the Paging Markets**

The Second Notice cites elimination of "head start" advantages as a reason for considering resale obligations in CMRS generally. Head start issues do not exist in the paging industry. For the last several years, the Commission has allocated spectrum to paging and the paging carriers have applied for and been granted spectrum according to their needs. There has been no mandatory staggered entry resulting from the licensing process and thus no need to consider the degree to which one entrant has had a substantial head start. The same has been true in narrowband paging. The FCC has held a sufficient number of auctions, authorizing those with services of similar geographic scope and service needs for spectrum at the same time. Thus, there is no basis to impose resale obligations on paging under a "need to mitigate head start rationale."

Based on this rationale, the Commission should not impose any resale restrictions on the paging market, where an average of five and up to nineteen facilities based competitors were found to

^{17/} Second CMRS Order, 9 FCC Rcd at 1168. In the Matter of Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988, 8017-20 (1994) (Third CMRS Order).

exist before narrowband PCS, where the markets overlap, the timing of the licenses is different, the build-out requirements are different, and no head start problems exist.

**E. Resale Obligations are Unnecessary to
Spur Technical Innovation or Service Diversity**

The highly competitive paging market is characterized by both technical innovation and service diversity, with the concomitant immediate benefits to the public. These benefits all contribute to the public interest being served by the current policy of not imposing resale for paging.

The last two years alone have seen a plethora of technical advances resulting in new services on traditional frequencies, as well as narrowband frequencies. Within just the last few months, PageNet has announced and/or implemented Image APB, a new wireless service that allows police to transmit a security camera photo of an alleged criminal instantly to squad cars all over the city or country; the wireless industry's first field tests of alphanumeric paging utilizing Motorola's high speed FLEX™ protocol, expected to double system capacity for numerical and alphanumeric messaging, and significantly enhanced network efficiency in the delivery of longer e-mail messages and other data; the introduction of the Apple Mobile Messaging System™, in which users of ApplePowerBook and Microsoft Windows -- compatible notebook computers -- may receive short and long wireless messages, calendar updates, news updates, and a variety of other information via PageNet's state-

of-the-art digital network; the introduction of the Pocket PageCard Wireless Messaging System, a complete wireless data communications solution for wireless users which allows wireless communication to any PCMCIA-host Microsoft Windows computer. The list of new services spawned from a combination of user demand and technical innovation goes on and on.

New offerings such as advanced paging, messaging and advanced cordless telephones are expected in the marketplace through narrowband PCS. These services include one-way systems with relatively low power transmissions from a subscriber to a base station, one-way with relatively high power transmissions from a base station to a subscriber, and one-way services that include facsimile, graphics and other imaging services. Also proposed are two-way services that would provide subscribers with more diverse messaging than is currently available, including for example, tracking and acknowledgment. In addition, two-way advanced cordless telephone services are proposed. **18/**

The rapid pace of technological innovation and service innovation and introduction stands on its head any rationale that a resale obligation is necessary to impose on the paging industry in order to spur technological innovation and service diversity.

18/ See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, 8 FCC Rcd 7162, 7163 (1993).

F. The Commission Does Not Need to Impose Resale Obligations on Paging Carriers in Order to Stimulate Demand for Paging Services

The Commission believes that one possible benefit to be gained by the imposition of a resale requirement in CMRS broadly might be the stimulation of demand of services. However, demand for paging and messaging services is at an all-time high. The industry simply does not need the Commission to interject itself into the market in order to stimulate demand. PageNet, for example, added approximately 1.3 million subscribers to service in 1994, and is adding subscribers now at a rate in excess of 450,000 per quarter. While the industry leader in new subscribers, PageNet is clearly only one of the pack. Because of the ready availability of service and the increased awareness of the tremendous value of both traditional and advanced paging, carriers are experiencing record growth, expected to average approximately 35%. ^{19/} The Commission has recognized that the paging industry was expected to reach 22 million subscribers by the end of 1994 and is anticipated to have 41.5 million customers by the year 2000. ^{20/} Therefore, any attempts by the Commission to impose a resale obligation in order to stimulate growth would be superfluous and, as set forth in Section II, counterproductive.

^{19/} Jeffrey Silva, "Monitoring high-growth paging proves a challenge for the FCC," 14 Radio Communications Report, May 22, 1995, at 29.

^{20/} Third CMRS Order, 9 FCC Rcd at 8017-20.

**II. ADVERSE EFFECTS ON PAGING CARRIERS WITH NO
CONTRAVENING BENEFITS TO THE PUBLIC WILL
RESULT IF MANDATORY RESALE IS IMPOSED**

As already noted, in each of the services where the Commission has imposed resale obligations, it sought a competitive market with service offered at reasonable rates and with new technological developments being brought to market. In the case of paging, those objectives have already been achieved without mandatory resale. Vigorous competition exists. Services are offered at reasonable rates. New technology and services are being introduced. No head start advantages exist to offset. Demand is at an all-time high. There are simply no benefits to be gained by the imposition of resale requirements on paging carriers.

But there is much to be lost. Such an intrusive regulation would result in a detriment to both the subscribers and the carriers. Imposition of mandatory resale for paging would be an unnecessary and unjustified regulatory intrusion into the carrier's normal business decisions. For instance, a paging carrier should be able to project the build-out of its facilities without having such growth projections thrown off by an unanticipated reseller's demand for capacity. In this circumstance, unpredicted growth would require the carrier to either add an additional system, perhaps in a different time frame than anticipated, discontinue its own projected growth, or crowd users onto the systems, thereby degrading speed and quality of

service. In addition, a paging carrier needs the ability to grow its usage on the spectrum allocated at a rate commensurate with projections developed in consideration of that scarce resource availability and as well as based on its financial plan.

Subscribers would also suffer from restricted competition if one carrier relies on its competitor's facilities to offer service. This could result in new facilities not being built, with the capacity for new or different services not available, which would, in turn, result in a decrease in both the facilities being available and the diversity of services offered. Subscribers, too, would also suffer if resale inhibits new technology and services from being brought to market. This would result in a decrease of facilities and diversity of services being offered. In addition, subscribers would not benefit if the goals of stimulating competition and promoting more efficient use of the spectrum are frustrated. This could result in higher prices, inferior service and lack of new offerings. Rather, these decisions should be left to the business judgment of the carriers.

In the cellular market, the Commission imposed resale obligations, but limited the resale requirement between facilities based carriers in the same market to the first five years of license. ^{21/} However, the Commission found that unrestricted resale was inappropriate because the benefits attributed to that

^{21/} Cellular Resale Order, 7 FCC 2d at 4007.

policy in private line and MTS/WATS would not be manifest in cellular. In fact, the Commission found that unrestricted resale could inhibit competition in cellular by encouraging one carrier to rely on its competitor's facilities, could lead to delays in deploying new technologies, and might create the potential for collusion between the two facilities based carriers. ^{22/} The Commission also found that the cellular restriction was justified in view of its goal of stimulating competition and promoting more efficient use of assigned cellular spectrum. ^{23/} Further, the Commission found that both facilities based carriers have the opportunity to serve the market. ^{24/} Thus, the Commission eliminated resale requirements in a duopoly market for the two facilities based carriers.

Those paging carriers whose facilities would be subject to resale would similarly suffer from those effects. The reseller would use the resold facilities and facilities based carrier's investment to obtain customers and then could flip its subscribers either to another system or its own system once it builds its facilities. ^{25/} In addition, the facilities based carrier could

^{22/} Id.

^{23/} Id.

^{24/} Id. at 4009.

^{25/} The reseller could also use the underlying carrier's investment to satisfy its own loading and build-out requirements on facilities it may ultimately license.

suffer from resale by having to increase its switching capability, incurring set-up costs, and suffering from other technical impediments.

It should be recognized that voluntary resale does exist in the paging industry where it makes sense to do so on a business basis. For instance, PageNet has voluntary agreements with hundreds of resellers operating on its various systems across the country. Those resellers have subscriber bases from 100 to thousands, and the number of resellers which PageNet services will likely continue to grow substantially in the future. But, we wish to stress, the resale relationships into which PageNet has entered and will continue to enter, are those which make business sense to PageNet, and do not degrade the quality or availability of service to PageNet subscribers.

**III. RESTRICTIONS ON RESALE OF PAGING SERVICES WOULD NOT
VIOLATE SECTIONS 201(b) OR 202(a) OF THE COMMUNICATIONS ACT**

In the Second Notice, the Commission requested comment on whether resale restrictions on paging services would violate the just and reasonable standard of Section 201(b) of the Communications Act and the nondiscrimination provisions of Section 202(a). ^{26/} The Commission also tentatively concluded that allowing a carrier to deny resale capacity to a fully operational facilities based competitor would not violate Sections 201(b) or 202(a). ^{27/}

^{26/} Second Notice, ¶ 87.

^{27/} Id. ¶ 90.

The test for determining whether resale restrictions are just and reasonable under Section 201(b) requires the weighing of any adverse impact on the public against the countervailing benefits to the public. ^{28/} Applying this test to paging, PageNet has substantiated that the benefits the Commission has stated it seeks already exist without governmental imposition of a resale requirement. These include the fact that the paging market is highly competitive; price discrimination does not exist; technological innovations and new services are commonplace; and that supply and demand for paging services is growing rapidly. Conversely, PageNet has demonstrated herein the detriments to the public if mandatory paging resale is required. As was found by the Commission when it allowed restrictions on cellular resale after the build-out period, unrestricted paging resale could inhibit facilities based competition and could lead to delays in introducing new technologies to the market, as well as cause economic harm to carriers, and service degradation to the public. ^{29/} Therefore, it is clear that the public would benefit from not mandating paging resale and that such a course of action would be just and reasonable under Section 201(b).

It has been equally substantiated that paging resale restrictions would not be unjust and unreasonable discrimination

^{28/} Cellular Resale Order, 7 FCC Rcd at 4008, and Cellular Resale NPRM, 6 FCC Rcd at 1721, citing Resale of Private Line Services, 60 FCC 2d at 281-83, Hush-a-Phone Corp. v. U.S., 238 F.2d 266 (D.C. Cir. 1956).

^{29/} Cellular Resale Order, supra.

under Section 202(a). Instead, such a resale restriction would foster the Commission's goal of stimulating competition and promoting more efficient use of the spectrum. Therefore, resale restrictions for paging services would not violate either Sections 201(b) or 202(a) of the Act and should be permitted.

IV. CONCLUSION

The record simply does not justify imposition of a policy whose stated objectives have already been achieved without that policy. The record does not support a finding that mandatory resale would be "just, fair and reasonable" ^{30/} or that is based on "reasoned consideration" of that evidence. ^{31/} In fact, imposition of mandatory resale for paging carriers would be arbitrary, capricious and an abuse of discretion, in violation of the Administrative Procedures Act. ^{32/}

In the Second Notice, the Commission raised questions as to whether mandatory resale is appropriate or lawful for paging and other wireless services. PageNet has demonstrated that the highly competitive characteristics of the paging market negate any need to impose resale requirements on paging and, conversely, that the public and paging carriers risk substantial harm if such a

^{30/} A.T. & T. v. F.C.C., 572 F.2d 17, 23 (2d Cir. 1978) quoting A.T. & T. v. F.C.C., 449 F.2d 439, 450-51 (2d Cir. 1971).

^{31/} A.T. & T. v. F.C.C., 572 F.2d at 23, quoting Permian Basin Area Rate Cases, 390 U.S. 747, 792, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968); Greater Boston Television Corp. v. F.C.C., 143 U.S.App.D.C. 383, 392, 444 F.2d 841, 850-52 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

^{32/} 5 U.S.C. § 706.

requirement is imposed by government fiat. Furthermore, Sections 201(b) and 202(a) of the Act do not require such a measure. In fact, imposition of mandatory resale on paging would be unjust and unreasonable, and unjustly and unreasonably discriminatory, in violation of Sections 201(b) and 202(a). Therefore, PageNet strongly urges the Commission not to impose a resale requirement on facilities based paging carriers.

Respectfully submitted,

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June 14, 1995

CERTIFICATE OF SERVICE

I, Courtenay P. Adams, hereby certify that a copy of the foregoing *Comments of Paging Network, Inc.* was sent, this 14th day of June 1995, by U.S. first class mail, postage prepaid, to the individuals on the attached service list.


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